# IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA.

***RSA No. 24 of 1996***

***Judgment reserved on : 12.9.2007***

**Date of Decision : October 29th, 2007**

---

Abida Begum …Appellant.

Versus:

State of H.P. and another …Respondents.

---

***Coram*:**

**The Hon'ble Mr. Justice Sanjay Karol, Judge**.

*Whether approved for reporting?*[1] *Yes*

For the appellant: Mr. Bimal Gupta, Advocate.

For the respondents. Mr. Ashok Chaudhary, Addl., Advocate General.

---

**Sanjay Karol, J.**

The present appeal arises out of the judgment and decree dated 27.10.1995 passed by the District Judge, Sirmaur at Nahan in Civil Appeal No. 32-N/13 of 1995/1992 titled as Abida Begum v. The Secretary (Health) to the Govt. of H.P. and another, upholding the judgment and decree dated 1.9.1992 passed by the Senior Sub Judge, Sirmaur at Nahan.

---

[1] **Whether reporters of Local Papers may be allowed to see the judgment?**

For the purposes of convenience, the appellant hereinafter is referred to as the 'plaintiff' and the respondents are referred to as the 'defendants'.

Plaintiff filed a suit for damages for a sum of Rs.2 lacs for failure of the leproscopic operation carried out by the functionaries of the State. On 12.3.1984, the plaintiff under-went a leproscopic operation at the District Hospital of the State of H.P. at Nahan. Despite the same, she conceived and delivered a child on 5.10.1985 and again conceived and delivered a child on 13.12.1987. She once again got herself operated for tubectomy operation on 18.1.1988. The suit was filed alleging negligence on the part of the doctors and employees of the Medical Department of the State of Himachal Pradesh.

The trial Court, based on the pleadings of the parties framed the following issues:-

"1. Whether the plaintiff is entitled to the damages, as prayed for? ….OPP

2. Whether the suit is bad for mis/non-joinder of necessary parties? …..OPD

3. Whether the suit is within time? …..OPP

4. Whether the plaintiff has no cause of action? …….OPD

5. Whether the suit is not maintainable in the present form? ….OPD

6. Relief."

Based on the material on record including the statements of the witnesses, the trial Court dismissed the suit

for the reason that in the absence of the impleadment of the doctors who were negligent in carrying out the operation the State could not be held to be vicariously liable. Suit of the plaintiff was held to be within time. On merits, it was so held that the operation did not guarantee 100% success and, therefore, the prevention of pregnancy is not an obligation upon the doctor or the State in any case the plaintiff allowed conception and gave birth to children twice after the failure of the operation.

Appeal against the aforesaid judgment and decree dated 1.9.1992 was filed by the plaintiff and the first Appellate Court, after appreciating the material on record on merits held that the failure of operation in itself would not attribute negligence on the part of the doctor in performing leproscopic operation. Plaintiff's treatment for her ailment of anemia by no stretch of imagination could prove negligence on the part of the doctor.

I have heard the learned counsel for the parties and gone through the records.

The appeal was admitted on the following substantial questions of law:-

> "1) Whether principle of *res ipsa loquitur* is applicable in the instant case and if so to what amount of compensation the appellant is entitled to?
>
> 2) Whether learned Distt. Judge has misconstrued, misinterpreted the material

> on record and the view taken by him is not possible on the basis of record?"

I have examined the record minutely and there was nothing on record to show that the doctors have been negligent in carrying out the operation. In fact plaintiff's evidence is totally lacking to support her plea of negligence attributable to the doctors.

From the perusal of the plaint, it is evident that the doctor who performed the leproscopic operation has not been impleaded as a party. That apart from the statement of the plaintiff Smt. Abida Begum (PW-2), it is clear that she has not even whispered that the doctors have been negligent in performing the tubectomy operation resulting into failure and therefore, subsequent conception of the plaintiff. She has deposed that after operation, she suffered weakness and she had irregular menses. She had also undergone pregnancy test which was found to be negative. She has admitted having conceived twice and given birth to children much after the date of the operation. She has admitted having received 30 mtrs. of land from the Government as compensation. She does not even remember the name of the doctor who had carried out the operation and has admitted that having come to know of the first conception, she did not visit any doctor for getting any child. In fact she admitted having visited the Health Centre for obtaining

the contraceptive after she had delivered the 1st child subsequent to the date of operation.

Even Dr. Pratibha Sud (PW-1) has not attributed the doctors negligence to be the cause of failure of the operation. In fact she has admitted that the plaintiff who had approached her was treated for anemia and that the leproscopic operation is not free from failure.

Defendants witness Dr. S. C. Jaswal (DW-1), has clearly brought out that there can be chances of failure of such an operation. Testing of urine is not sure way of ascertaining the factum of pregnancy. According to this witness, who is an expert, female and male operations are not 100% successful. As per international norms the failure rate can be up to 5 to 6 per thousand and the percentage can still vary. He has referred to various authoritative tests abstracts of which have been exhibited on record. Shri M. L. Gupta (DW-2) has corroborated the statement of DW-1. Statement of Shri J. P. Nadda (DW-4) is also to the said effect.

In ***State of Punjab*** v. ***Shiv Ram & Others*** (2005(7) SCC 1), the Apex Court held that negligence is the breach of a duty caused by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do and further a simple lack of care, an error of judgment or an

accident, is not a proof of negligence of medical profession. The cause of action for claiming compensation in cases of failed sterilization operation arises on account of negligence of the surgeon and not on account of child birth. Failure due to natural causes would not provide any ground for claim. It is for the woman who has conceived the child to go or not to go for medical termination of pregnancy. Having gathered the knowledge of conception in spite of having undergone sterilization operation, if the couple opts for bearing the child, it ceases to be an unwanted child. Compensation for maintenance and upbringing of such a child cannot be claimed. That there can be failure in carrying out the leproscopic operation has also been noticed by the Court.

***Shiv Ram*** (supra) has been followed in 2005(7) SCC 22 (***State of Haryana & others*** v. ***Raj Rani***), wherein the Apex Court has held that the doctor can be held liable only in cases where the failure of the operation is attributable to his negligence and not otherwise. Several textbooks on medical negligence have recognized the percentage of failure of the sterilization operation due to natural causes to be varying between 0.3% to 7% depending on the techniques or method chosen for performing the surgery out of the several prevalent and acceptable ones in medical science. The fallopian tubes which are cut and sealed may reunite and the woman may conceive though the surgery was performed by a proficient

doctor successfully by adopting a technique recognized by medical science. Thus, the pregnancy can be for reasons *dehors* any negligence of the surgeon. In the absence of proof of negligence, the surgeon cannot be held liable to pay compensation. Then the question of the State being held vicariously liable also would not arise. The decrees cannot, therefore, be upheld.

The fact that the State can be held vicariously liable for the negligent act of its Doctors in performing the operation now stands settled by the Apex Court in ***Achutrao Haribhau Khodwa & Others*** v. ***State of Maharashtra & Others*** (1996(2) SCC 634). Running a hospital is a welfare activity undertaken by the Government and the same cannot be regarded as being an activity having a sovereign character. The question is answered accordingly.

In ***Spring Meadows Hospital and another*** v. ***Harjol Ahluwalia*** (1998(4) SCC 39), the Apex Court has held as under:-

> "Very often in a claim for compensation arising out of medical negligence a plea is taken that it is a case of bona fide mistake which under certain circumstances may be excusable, but a mistake which would tantamount to negligence cannot be pardoned. In the former case the Court can accept that ordinary human fallibility precludes the liability while in the latter the conduct of the defendant is considered to have gone beyond the bounds of what is expected of the skill of a reasonably competent doctor.

Gross medical mistake will always result in a finding of negligence. Use of wrong drug or wrong gas during the course of anaesthetic will frequently lead to the imposition of liability and in some situations even the principle of res ipsa loquitur can be applied. Even delegation of responsibility to another may amount to negligence in certain circumstances. A consultant could be negligent where he delegates the responsibility to his junior with the knowledge that the junior was incapable of performing of his duties properly."

In ***Cholan Roadways Ltd.*** v. ***G. Thirugnanasambandam*** (2005(3) SCC 241), the Apex Court has held as under:-

"The general purport of the words *res ipsa loquitur* is that the accident "speaks for itself" or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Once the said doctrine is found to be applicable the burden of proof would shift on the delinquent."

In ***Jacob Mathew*** v. ***State of Punjab and another*** (2005(6) SCC 1), the Apex Court has held as under:-

"No sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single failure may cost him dear in his career. Even in civil jurisdiction, the rule of *res ipsa loquitur* is not of universal application

and has to be applied with extreme care and caution to the cases of professional negligence and in particular that of the doctors. Else it would be counter productive. Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable *per se* by applying the doctrine of *res ipsa loquitur*.

At least three weighty considerations can be pointed out which any forum trying the issue of medical negligence in any jurisdiction must keep in mind. These are: (i) that legal and disciplinary procedures should be properly founded on firm, moral and scientific grounds; (ii) that patients will be better served if the real causes of harm are properly identified and appropriately acted upon; and (iii) that many incidents involve a contribution from more than one person, and the tendency is to blame the last identifiable element in the chain of causation, the person holding the "smoking gun".

The jurisprudential concept of negligence defies any precise definition. In current forensic speech, negligence has three meanings. They are; (i) a state of mind, in which it is opposed to intention; (ii) careless conduct; and (iii) the breach of a duty to take care that is imposed by either common or statute law. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings.

Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would not do. Negligence becomes actionable on account of injury

resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence, as recognized are three; "duty", "breach" and "resulting damage", that is to say;

(1) the existence of a duty to take care, which is owed by the defendant to the complainant;

(2) the failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and

(3) damage, which is both casually connected with such breach and recognized by the law, has been suffered by the complainant.

If the claimant satisfies the court on the evidence that these three ingredients are made out, the defendant should be held liable in negligence."

Considering the entire material on record, there is nothing on record to show and prove that the doctors have been negligent in carrying out the operation performed on the plaintiff on 12.3.1984. In the instant case, since no negligence has been found, therefore, principle of *res ipsa loquitur* is not applicable. The facts have been properly construed and interpreted. The findings of the Court below are based on cogent material and correct appreciation of facts and I see no reason to interfere with the same.

The questions of law are answered accordingly and the appeal is dismissed.

**October 29th, 2007.** **(Sanjay Karol)**
***(rana)*** **Judge.**